STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

BRUCE MILLAR, an individual,

Plaintiff-Appellant,

V

CONSTRUCTION CODE AUTHORITY, CITY OF IMLAY CITY, and ELBA TOWNSHIP,

Defendants-Appellees. /

Supreme Court No. 154437

Court of Appeals No. 326544

Lower Court No. 14-047734-CH

DEFENDANT-APPELLEE CITY OF IMLAY CITY'S ANSWER IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED

The Lapeer County Circuit Court entered an Order Granting Dispositive Motions in favor of Defendants-Appellees on March 19, 2015. Plaintiff-Appellant Bruce Millar timely filed a claim of appeal on March 23, 2015. On August 4, 2016, the Court of Appeals issued an unpublished opinion affirming the trial court's order. Plaintiff-Appellant then timely filed an application for leave to appeal with this Court on September 15, 2016. This Court thus has discretion to exercise its jurisdiction under MCR 7.303(B)(2). But, where the case was decided on a straightforward application of the Whistleblowers' Protection Act's limitations period, see MCL 15.363(1), Defendant-Appellee City of Imlay City urges this Court to deny leave. The Court of Appeals' decision is correct and this case does not present a legal principle of significance to the state's jurisprudence.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I.

Did the Court of Appeals properly determine that Millar's Whistleblowers' Protection Act Claim was time-barred where it was not filed within 90 Days "after the occurrence of the alleged violation," as the plain language of the act and interpretative case law require?

Plaintiff-Appellant answers, "No."

Defendant-Appellee City of Imlay City answers, "Yes."

The Lapeer County Circuit Court answered, "Yes."

The Michigan Court of Appeals answered, "Yes"

II.

Did the Court of Appeals correctly determine that Millar's public policy wrongful termination claim fails as a matter of law because the Whistleblowers' Protection Act provided his exclusive remedy?

Plaintiff-Appellant answers, "No."

Defendant-Appellee City of Imlay City answers, "Yes."

The Lapeer County Circuit Court answered, "Yes."

The Michigan Court of Appeals answered, "Yes"

III.

Does the City of Imlay City's entitlement to governmental immunity under the Government Tort Liability Act provide an additional basis for dismissal of Millar's wrongful termination and civil conspiracy claims?

Plaintiff-Appellant answers, "No."

Defendant-Appellee City of Imlay City answers, "Yes."

The Lapeer County Circuit Court did not address this issue.

The Michigan Court of Appeals did not address this issue.

IV.

Should this Court deny Millar's request to amend his complaint because any amendment of the complaint would be futile?

Plaintiff-Appellant answers, "No."

Defendant-Appellee City of Imlay City answers, "Yes."

The Lapeer County Circuit Court did not address this issue.

The Michigan Court of Appeals did not address this issue.

COUNTER-STATEMENT OF THE GROUNDS FOR REVIEW

Plaintiff-Appellant Bruce Millar ("Millar") brought this lawsuit alleging that Defendant-Appellee City of Imlay City ("Imlay City"), along with co-defendants Construction Code Authority and Elba Township, (a) violated the Michigan Whistleblowers' Protection Act, MCL 15.361, *et seq*., (b) wrongfully terminated him from working as a plumbing, mechanical and/or fire inspector in the jurisdictions of Imlay City and Elba Township in violation of public policy, and (c) engaged in a civil conspiracy to violate his rights. **Exhibit A**, Complaint, 6/26/14.[1]

Upon Defendants' respective motions to dismiss and for summary disposition, the Lapeer County Circuit Court dismissed Millar's complaint with prejudice, finding that Millar's Whistleblowers' Protection Act claim was untimely because he did not initiate the action within 90 days of a March 27, 2014 letter from the Construction Code Authority notifying Millar that neither Elba Township nor Imlay City wished to have Millar serve as an inspector within their respective jurisdictions. The court rejected Millar's contention that the claim accrued on March 31, 2014 when he alleges that he received the letter. **Exhibit B**, Tr 3/2/15, pp 11-12. With respect to the wrongful termination claim, the circuit court concluded that the exclusive remedy provision of the Whistleblowers' Protection Act barred Millar's claim where his wrongful termination claim "flow[ed] from the same circumstances surrounding his Whistleblowers' Protection Act claim." *Id*., p 14. Finally, the circuit court concluded that dismissal of the Whistleblowers' Protection Act and wrongful termination claims mandated dismissal of Millar's claim for civil conspiracy, which requires

[1] Exhibit references refer to the exhibits attached to Imlay City's brief in the Court of Appeals.

a showing of "some underlying tortious conduct as civil conspiracy is not an independently actionable tort." *Id*., pp 14-15.

The Court of Appeals affirmed the trial court's order. The Court first determined that a claim under the Whistleblowers' Protection Act accrues at "the time the wrong upon which the claim is based was done regardless of the time when damage results." Slip op, p 6, citing *Joliet v Pitoniak,* 475 Mich 30, 36; 715 NW2d 60, 65 (2006). Thus, under the circumstances of this case, the alleged wrong in fact occurred when the City wrote a letter to the Construction Code Authority on March 20, 2014, directing it to terminate Millar's services. *Id*. Therefore, Millar was required to commence his Whistleblowers' Protection Act claim against the City within 90 days of that date, but failed to do so. *Id*. Even using the date that the Construction Code Authority sent a letter to Millar – March 27, 2014 – the claim was still untimely. *Id*.

The Court of Appeals next addressed the wrongful termination in violation of public policy claim and found that "the crux of both claims [Whistleblowers' Protection Act and wrongful termination] arise from the same alleged wrongful conduct—i.e. retaliatory termination for reporting various code violations," and therefore, "the WPA provided a statutory remedy for the alleged retaliation in response to plaintiff's reporting the various violations. That remedy was exclusive and not cumulative." Slip op, p 7 (internal citation and punctuation omitted). Accordingly, the trial court did not err in dismissing the wrongful termination claim. *Id*., p 8. Finally, because Millar's Whistleblowers' Protection Act claim was time-barred and the wrongful termination claim failed as a matter of law, "necessarily, his conspiracy claim also fails as a matter of law." *Id*.

Millar argues that the Court should not require an employee "to constantly ask whether any adverse employment action is in the works," and "should not direct that the clock begins to run on a [Whistleblowers' Protection Act] claim when an employer makes a decision to take action" but does not convey this decision to the employee. Application for Leave, p 21. To the contrary, such an interpretation, based on this Court's determination that the claim accrues at "the time the wrong upon which the claim is based was done regardless of the time when damage results," *Joliet,* 475 Mich at 36, does not lead to material injustice. Millar, by his own admission, was aware at least by March 31, 2014 that Imlay City had requested on March 20, 2014 that the Construction Code Authority send a different employee other than Millar to conduct inspections within the City. Accordingly, he had plenty of time to file his Whistleblowers Protection Act claim within 90 days of the City's alleged wrongful act; he simply failed to do so.

Even if the Court were inclined to sympathize with Millar, condoning a court's use of its equitable power here is unwarranted. The Court has recognized that, "[r]egardless of how unjust the statutory penalty might seem to this Court, it is not our place to create an equitable remedy for a hardship created by an unambiguous, validly enacted, legislative decree." *Stokes v Millen Roofing Co*, 466 Mich 660, 672; 649 NW2d 371 (2002). Equity cannot be allowed "to contravene the clear statutory intent of the Legislature." *Id*. at 677 (Markman, J., concurring). Instead, equity is "traditionally reserved for 'unusual circumstances' such as fraud or mutual mistake." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590; 702 NW2d 539 (2005). Neither is present here. Accordingly, leave must be denied.

COUNTER-STATEMENT OF FACTS

A. Material facts.

According to Millar's complaint, Millar was employed as an at-will plumbing, mechanical and/or fire inspector by Construction Code Authority during all times relevant to this action. **Exhibit A**, Complaint, ¶¶ 1, 9. Imlay City contracted with the Construction Code Authority for these services by an Interlocal Agreement as permitted by the Urban Cooperation Act of 1967, MCL 124.501, *et seq*. Accordingly, in the course of his employment, Millar claims to have conducted "numerous commercial and residential inspections in Imlay City and Elba Township." **Exhibit A**, Complaint, ¶ 12.

On March 20, 2014, Imlay City Manager Dennis Collison authored and sent a letter to Construction Code Authority Chairman Scott Jarvis indicating that the City did not wish to have Millar perform inspections in the community, effective immediately. In pertinent part, that letter provided: "The City of Imlay City is requesting that plumbing and mechanical inspector, Bruce Millar, not do inspections in the community effective immediately." **Exhibit C**, 3/20/14 Correspondence from Imlay City to Jarvis. Elba Township had sent a very similar letter only nine days earlier, on March 11, 2014, requesting that "Bruce Millar no longer perform inspections within Elba Township." **Exhibit D**, 3/11/14 Correspondence from Elba Township to Hayes.

Millar was informed of Imlay City and Elba Township's directives on March 27, 2014, when Jarvis authored and provided written correspondence to Millar, the pertinent part of which provided:

> Please be advised that I have recently been notified by both Elba Township and Imlay City. I regret to inform you that they no longer wish for you to act as their plumbing and mechanical official and request that you immediately

> cease conducting all mechanical and plumbing inspections within their communities.

Exhibit E, 3/27/14 Correspondence from Jarvis to Millar; **Exhibit A**, Complaint, ¶ 18. That correspondence reiterated Millar's continued employment with Construction Code Authority: "You, as well as your knowledge and expertise are extremely valuable to our organization. I am confident we can all proceed and continue to work together in a professional manner as your employment continues with this company and for the remaining municipalities it represents." *Id*.

B. Material proceedings.

1. Millar files his complaint.

On June 26, 2014 – 98 days after Imlay City's letter to Construction Code Authority and 91 days after Construction Code Authority's letter to Millar – Millar filed this action in Lapeer County Circuit Court, naming Construction Code Authority, City of Imlay City, and Elba Township as defendants. **Exhibit A,** Complaint. Millar claimed that the defendants violated the Whistleblowers' Protection Act (Count I), wrongfully terminated him in violation of public policy (Count II), and engaged in civil conspiracy "to commit the wrongdoings set forth in Counts I and II." (Count III). *Id*., ¶ 7. Imlay City's answer denied liability and asserted the following defenses: (1) that portions of Plaintiff's claims were time-barred; (2) that the Whistleblowers' Protection Act provided the exclusive remedy available to Millar, requiring dismissal of all other counts; (3) that Imlay City was entitled to governmental immunity; and (4) that Millar failed to state a claim for conspiracy, or for any other claim upon which relief could be granted. Imlay City's Answer to Plaintiff's Complaint, Affirmative Defenses, Reliance Upon Jury Demand, 8/19/14.

2. Imlay City moves to dismiss.

Consistent with those defenses, Imlay City moved to dismiss Millar's complaint in its entirety pursuant to MCR 2.116(C)(7) and 2.116(C)(8). Defendant City of Imlay City's Motion to Dismiss, 1/2/15. Imlay City argued that Millar's suit was commenced outside the 90-day statute of limitations for Whistleblowers' Protection Act claims, which began running on March 20, 2014, when the alleged wrongful action, i.e., the City's letter requesting that Millar no longer perform work within its jurisdiction, was sent. *Id*., p 8. With respect to the wrongful termination and conspiracy claims, Imlay City argued that it was entitled to governmental immunity as it was engaged in the discharge or exercise of a governmental function when making requests to the Construction Code Authority concerning the delivery of code inspections and enforcement with the City. *Id*., pp 7-8. Co-Defendants Elba Township and Construction Code Authority also moved for summary disposition on virtually identical grounds.

Millar opposed the motions, claiming that his Whistleblowers' Protection Act claim was timely filed because he "was entirely unaware until March 31, 2014" of the letters from Imlay City and Elba Township, and that therefore the start date for purposes of calculating the 90-day period should begin on that date. Millar's Response in Opposition to Imlay City's Motion to Dismiss and Elba Township's Motion for Summary Disposition, 2/13/15, p 7. Next, Millar summarily asserted in a single paragraph that his "Whistleblowers' Protection Act claims are not exclusive," suggesting that "discovery may flesh out for the plaintiff exactly what did go on prior to restricting his work opportunities and responsibilities[.]" *Id*., p 8. Finally, Millar claimed that neither Imlay City nor Elba Township was protected by governmental immunity "for colluding and conspiring to bar a building inspector from its

jurisdiction because it disagrees with and takes exception to the inspector's good faith code enforcement efforts." *Id*., pp 8-9. Millar requested the circuit court permit further discovery. *Id*., p 9.

Imlay City filed a brief reply, refuting Millar's request for further discovery to support his wrongful "termination" and conspiracy claims as irrelevant because those claims are statutorily barred as a matter of law. Defendant Imlay City's Reply to Plaintiff's Response to its Motion to Dismiss, 2/25/15. With respect to Millar's Whistleblowers' Protection Act claim, Imlay City stressed that the plain language of the statute requires the suit to be brought within 90 days "of the alleged violation," which allegedly occurred when Imlay City notified Construction Code Authority in writing that it no longer wanted Millar to perform inspection work in its jurisdiction, on March 20, 2014. *Id*., p 2. Imlay City pointed out that both case law from the Michigan Supreme Court and the federal district of Michigan have interpreted the statute in this way. *Id*. With respect to Millar's public policy wrongful "termination" claim, Imlay City pointed out that reporting violations of building codes, regulations, rules, and statutes "is clearly within the auspices of the Whistleblowers' Protection Act, and the Whistleblowers' Protection Act is therefore Plaintiff's exclusive remedy." *Id*., p 3. Finally, Imlay City confirmed that there is no "intentional tort" or "conspiracy" exception to governmental immunity, which applied to bar Millar's conspiracy claim. *Id*., pp 3-4.

3. The trial court rules in Imlay City's favor and the Court of Appeals affirms.

The Honorable Nick O. Holowka entertained oral argument on Imlay City's dispositive motion on March 2, 2015. The court simultaneously considered the Construction Code Authority and Elba Township's motions for summary disposition. After

considering the arguments of counsel, the circuit court determined that Millar's Whistleblowers' Protection Act claim was time-barred, reasoning as follows:

> Here, viewing the evidence in the light most favorable to the plaintiff, the last alleged violation of the Whistleblowers' Protection Act, if any, occurred when the Construction Code Authority notified the Plaintiff in writing on March 27, 2014, that neither Elba Township nor Imlay City wished to have the Plaintiff serve as an inspector within their respective jurisdictions.
>
> Plaintiff does not allege any further violations of the Whistleblowers' Protection Act by the Defendants after that date. Consequently, the 90-day limitation period began to run March 27, 2014. This means Plaintiff had until June 25, 2014 to file his lawsuit. However, as previously stated, the Plaintiff did not initiate the present action until June 26, 2014. Plaintiff's Whistleblowers' Protection Act claim, therefore, is untimely and dismissal is warranted.

Tr 3/2/15, pp 11-12.

The circuit court also dismissed Millar's wrongful termination claim on the basis that it was barred by the exclusive remedy provision of the Whistleblowers' Protection Act, because "a review of the Plaintiff's complaint reveals that the Plaintiff's wrongful termination claim flows from the same circumstances surrounding his Whistleblowers' Protection Act claim." *Id.*, p 14. Finally, the circuit court concluded that Millar's civil conspiracy claim failed where Millar could not demonstrate "some underlying tortious conduct" as required for a civil conspiracy claim, given the dismissal of the Whistleblowers' Protection Act and wrongful termination claims. *Id*., pp 14-15.

A corresponding order was entered on March 19, 2015. **Exhibit F**. Millar timely appealed that decision and the Court of Appeals affirmed. The Court first held that a claim brought under the Whistleblowers' Protection Act accrues at "the time the wrong upon which the claim is based was done regardless of the time when damage results." Slip op., p 6, citing *Joliet*, 475 Mich at 36. Thus, under the facts of this case,

> [T]he alleged wrong occurred when the City and Township wrote the letters to the CCA directing the CCA to terminate plaintiff allegedly in retaliation for his protected activity. In other words, while damages resulted when plaintiff received the letter, the wrong upon which plaintiff's claim is based occurred when the City and Township terminated plaintiff in retaliation for his protected activity—i.e. March 11, 2014 and March 20, 2014. Therefore, plaintiff was required to commence his WPA action within 90 days of those dates. Plaintiff failed to do so.

Slip op, p 6. Even using the date that the Construction Code Authority sent a letter to Millar – March 27, 2014 – the claim was still untimely. *Id*.

The Court of Appeals next addressed the wrongful termination in violation of public policy claim and found that "the crux of both claims [Whistleblowers' Protection Act and wrongful termination] arise from the same alleged wrongful conduct—i.e. retaliatory termination for reporting various code violations," and therefore, the Whistleblowers' Protection Act provided a statutory remedy for the alleged retaliation – a remedy that was "exclusive and not cumulative." Slip op, p 7 (internal citation and punctuation omitted). Accordingly, the trial court did not err in dismissing the wrongful termination claim. *Id*., p 8.

It followed that, because Millar's Whistleblowers' Protection Act claim was time-barred and the wrongful termination claim failed as a matter of law, "necessarily, his conspiracy claim also fails as a matter of law." Slip op, p 8. The Court further observed that the conspiracy claim failed because Millar "alleged that the three entities were one-in-the same for purposes of the WPA," and therefore he "cannot show that there were three separate entities that conspired together to terminate him." *Id*. Given its resolution of these issues, the Court did not consider whether the City was entitled to governmental immunity for the wrongful termination and conspiracy claims. *Id*., n 1.

Millar now seeks leave to appeal with this Court.

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dybata v Wayne Co*, 287 Mich App 635, 638; 791 NW2d 499 (2010). Pursuant to MCR 2.116(C)(7), "[s]ummary disposition may be granted when, among other things, a claim is barred by governmental immunity." *Id*. at 637. "When considering a motion brought under subrule (C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact precluding summary disposition." *Id*. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law." *Id*.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone. *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). The motion must be granted if no factual development could justify the plaintiff's claim for relief. *Id*.

ARGUMENT I

The Court of Appeals Properly Determined That Millar's Whistleblowers' Protection Act Claim Was Time-Barred Where It Was Not Filed Within 90 Days "After The Occurrence Of The Alleged Violation," As The Plain Language Of The Act And Interpretative Case Law Require

The Whistleblowers' Protection Act requires a civil action to be brought "within 90 days after the occurrence of the alleged violation[.]" MCL 15.363(1). Here, the alleged violation occurred on March 20, 2014, when Imlay City advised the Construction Code Authority in writing that it no longer wished to use Millar for inspection services. **Exhibit C**. Even if the date of March 27, 2014 is used (the date the Construction Code Authority notified Millar in writing that Imlay City and Elba Township no longer desired his services in their jurisdictions), Millar's Complaint was still untimely, not having been filed until June 26, 2014 – 98 days after Imlay City's letter to Construction Code Authority and 91 days after Construction Code Authority's letter to Millar. Millar's position – that the violation occurred on March 31, 2014, the date he received the communication – is contrary to the plain language of the statute and controlling case law.

A. The plain language of the Whistleblowers' Protection Act requires that a claim be filed within 90 days after the occurrence of the alleged violation.

MCL 15.363(1) provides a 90-day limitations period for a Whistleblowers' Protection Act claim, stating in relevant part:

> A person who alleges a violation of this act by bringing a civil action for appropriate injunctive relief, or actual damages, or both must do so within 90 days *after the occurrence of the alleged violation of this Act*.

(Emphasis added). In *Covell v Spengler*, 141 Mich App 76; 366 NW2d 76 (1985), the Court of Appeals confirmed that the Whistleblowers' Protection Act's 90-day limitations period is not unduly or unconstitutionally short and applies to all claims for all damages under the

act. Stated otherwise, violation of the 90-day limitation period bars an action under the Whistleblowers' Protection Act regardless of the remedy requested. *Id*.

As set forth in Millar's complaint, the basis for his Whistleblowers' Protection Act claim against Imlay City, specifically, is that the City "notified Defendant Construction Code Authority in writing that Imlay City did not wish for Plaintiff Millar to continue performing inspecting work in its jurisdiction." **Exhibit A**, Complaint, ¶¶ 16, 28. That written request was sent on March 20, 2014 via Imlay City Manager Dennis Collison to Construction Code Authority Chairman Scott Jarvis, "effective immediately." **Exhibit C**, 3/20/14 Correspondence from Imlay City to Jarvis. Thus, the alleged violation of the Whistleblowers' Protection Act by Imlay City occurred on March 20, 2014, when the City stated in writing that it no longer wanted Millar performing inspections in its community. Millar did not file his Whistleblowers' Protection Act claim within 90 days from that date, or by June 18, 2014, rather, he filed it 98 days later on June 26, 2104.

Even assuming the claim accrued on March 27, 2014, which is the date when Millar was informed of Imlay City's (and Elba Township's) directives via written correspondence from the Construction Code Authority to Millar indicating that Imlay City and Elba Township "no longer wish for you to act as their plumbing and mechanical official and request that you immediately cease conducting all mechanical and plumbing inspections within their communities," see **Exhibit E**, 3/27/14 Correspondence from Jarvis to Millar; Exhibit A, Complaint, ¶ 18), Millar's claim was untimely, having been filed 91 days later on June 26, 2014. Therefore, the Court of Appeals properly affirmed the trial court's order finding that Millar's Whistleblowers' Protection Act claim was time barred.

B. Millar's arguments to the contrary do not compel a different conclusion.

In response to the inevitable conclusion that his claim is time-barred, Millar first attempts to distinguish controlling case law. Millar asserts that *Joliet* is inapposite (see Application for Leave, pp 17-18), but, as recognized by the Court of Appeals (slip op, pp 5-6), this Court's decision in that case addresses claim accrual and is directly on point. The issue in *Joliet* was whether a claim for violation of the Civil Rights Act accrues on the date of the alleged discriminatory act or on the plaintiff's last day of work. The applicable statute of limitations was "3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." *Id*., at 36, quoting MCL 600.5805(9). This Court noted that "accrual under the three-year statute of limitations is measured by 'the time the wrong upon which the claim is based was done regardless of the time when damage results.'" *Id*. at 36, quoting MCL 600.5827. Accordingly, the Court concluded that the plaintiff's claims were barred by the statute of limitations because they were not brought within three years of the date of the alleged wrongdoing. *Id*.

Further, and contrary to Millar's additional argument that *Joliet* is not on point because it addresses a claim under the Civil Rights Act (see Application for Leave, p 17-19), this Court specifically noted in *Joliet* that a claim under the Whistleblowers Protection Act accrues "on the 'occurrence of the alleged violation of this act.'" 475 Mich at 40, citing *Jacobson v Parda Fed Credit Union*, 457 Mich 318, 577 NW2d 881 (1998) (Taylor, J., dissenting), overruled by *Joliet*, 475 Mich 30.

Millar next argues that various cases stand for the proposition that an employee's knowledge of the employer's violative conduct – that is, when the action is made and communicated to the employee – determines the accrual date. He first discusses *Collins v*

Comerica Bank, 468 Mich 628; 664 NW2d 713 (2003) (see Application for Leave, pp 15-16), which the *Joliet* court distinguished from the facts before it. *Joliet* addressed a constructive discharge situation while *Collins* was a discriminatory discharge case. A claim based on discriminatory discharge occurs on the day of the discharge. *Joliet,* 475 Mich at 37. In *Collins*, the plaintiff was first suspended, and then terminated. Thus on the facts of *Collins*, the claim accrued when the plaintiff was actually discharged – not on the day she last worked, i.e. the date she was suspended. "[I]f a discharge has yet to occur, it cannot be said that the last day worked represents the discharge date." *Collins*, 468 Mich at 633. By contrast here, the discharge date was March 20, 2014, or at the latest March 27, 2014. In *Niezgoski v Quality Home Care, Inc*, 2005 WL 176931 (Mich App 1/27/05), upon which Millar also relies (see Application for Leave, p 16), nothing suggested that the date of the employer's separation letter was different than the date the plaintiff was notified of her separation.

Millar also cites several recent decisions from this Court and the Court of Appeals addressing the Whistleblowers Protection Act, but none of them involve claim accrual. Therefore, they are irrelevant with respect to whether the lower courts erred in finding Millar's claim time-barred and whether this Court should grant leave. For example, in *Wurtz v Beecher Metro Dist*, 495 Mich 242, 249-50; 848 NW2d 121 (2014), this Court held that a contract employee whose term of employment had expired without being subject to a specific adverse employment action under the Whistleblowers Protection Act and whose contract was not renewed, had no remedy under the Act because, by its express language, the act applies only to current employees. It is likewise unclear why Millar cites *Smith v City of Flint*, 313 Mich App 141, 150-51; 883 NW2d 543 (2015), wherein the Court of Appeals

held that a police officer's assignment to patrol an allegedly dangerous part of the city did not constitute an adverse employment action under the Whistleblowers Protection Act. *Smith* otherwise supports Imlay City's position since the Court determined that the plaintiff's complaint was otherwise untimely because the order relieving him of his duties as union president and returning him to the position of road patrol was issued April 2012, but he did not file his complaint until May 31, 2013, well past the 90-day limitations period. *Id*. at 150. .

Finally, Millar makes the curious assertion that "where Defendants are found to be one and the same for purposes of the WPA, none can rely on an earlier accrual date." Application for Leave, p 21. But the Court of Appeals made no such finding. Instead, the Court simply noted that the Defendants did not challenge the ***complaint***'s allegation that "the City and Township exercised control over CCA through appointment of CCA's board of directors such that the City and Township constituted plaintiff's 'employer' for purposes of the WPA," and that in essence, "the CCA was an extension of the City and the Township and neither the City nor the Township challenged plaintiff's assertion." Slip op, p 8. Regardless, even if all three Defendants are considered one and the same, both the Circuit Court and the Court of Appeals correctly noted that Millar's claim remained untimely, having been filed 91 days after March 27, 2014 – the date Construction Code Authority wrote to Millar to inform him that he was terminated from performing inspection services in Imlay City and Elba Township. Accordingly, the Court of Appeals properly affirmed the trial court's order finding that Millar's Whistleblowers' Protection Act claim was time-barred, and therefore, this Court should deny leave to appeal.

ARGUMENT II

The Court Of Appeals Correctly Determined That Millar's Public Policy Wrongful Termination Claim Fails As A Matter Of Law Because The Whistleblowers Protection Act Provided His Exclusive Remedy

A. The Whistleblowers Protection Act provides the exclusive remedy for Millar's claim.

Michigan law clearly establishes that that the Whistleblowers' Protection Act provides the exclusive remedy for individuals who claim they have been retaliated against for reporting alleged violations of law, and it preempts all related public policy claims. *Anzaluda v Neogen Corp*, 292 Mich App 626; 808 NW2d 804 (2011); *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 79-80 (1993), disapproved on other grounds by *Brown v Detroit Mayor*, 478 Mich 589, 595 fn2; 734 NW2d 514 (2007); *Dolan v Continental Airlines*, 454 Mich 373, 383; 563 NW2d 23 (1997).

As the Court of Appeals explained in *Anzaluda*, the Whistleblowers' Protection Act, "provides that an employer shall not discharge or otherwise retaliate against an employee because the employee 'reports or is about to report ... a violation or a suspected violation of a law or regulation' or because 'an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body.'" 292 Mich App at 630, quoting MCL 15.362. The Whistleblowers' Protection Act is "the exclusive remedy for such retaliatory discharge and consequently preempts common-law public-policy claims arising from the same activity." *Id*. at 631, citing *Dudewicz*, 443 Mich at 70, 78-79.

The Court further instructed that it looks "to the true nature of a complaint, reading the complaint as a whole and looking beyond the parties' labels to determine the exact nature of the claim." *Anzaluda*, 292 Mich App at 631. Hence, "a plaintiff asserting a claim for

termination in violation of public policy that arises from circumstances that establish a claim for relief under the WPA will be subject to the WPA's exclusive remedy and will not be permitted to evade the 90-day limitations period by recasting the claim as a public-policy claim." *Id*. at 631-32. For example, in *Anzaluda*, the Court of Appeals determined that the plaintiff was engaged in a protected activity under the Whistleblowers' Protection Act when she assisted a boiler inspector with his investigation at her employer's laboratory. Therefore, her alleged public policy claim was within the Act's exclusive remedy and subject to the 90-day limitations period. *Id*. at 635-36.

The same result must follow here. "A plain reading of the WPA reveals that employees who report violations or suspected violations of the law to a public body are entitled to protection under the act." *Dolan*, 454 Mich at 381. Count I of Millar's complaint clearly alleges that Millar's services were discontinued because he reported building code and other statutory violations:

> 25. Plaintiff Millar was terminated from working as a plumbing, mechanical and/or fire inspector in the jurisdictions of Imlay City and Elba Township due to and in retaliation for his pattern of fairly and honestly indicating his intentions to report and/or reporting violations of building codes, regulations, rules and statutes in accordance with his responsibilities as an employee and as a licensed Mechanical Inspector, Plumbing Inspector, Plan Reviewer, Certified Fire Inspector and Journey Plumber.

Exhibit A, Complaint. Thus, the claim falls within the ambit of the Whistleblowers' Protection Act. Because the Act provides a statutory basis for relief to Millar for the alleged actions of Imlay City, his public policy claim was properly dismissed.

B. Millar's arguments to the contrary are without merit.

Millar first contends that the Court of Appeals erroneously dismissed his public policy wrongful termination claim based on the incorrect conclusion that the wrongful

termination claim was based only on reporting code violations. Application for Leave, pp 22-23. But Millar does not, because he cannot, explain how the Court of Appeals erred in this respect, given the allegations in his complaint, as provided above. Instead, he makes the conclusory assertion that the Court's conclusion "results in material injustice." *Id*., p 23.

Millar then makes a nonsensical attempt to distinguish *Anzaluda, Dudewicz*, and *Dolan* on the ground that those plaintiffs stated a valid claim under the Whistleblowers Act, whereas his complaint allegedly asserts "a myriad of events and conduct potentially giving rise to liability under the WPA in violation of public policy and/or in conspiracy[2]." *Id*., p 23. But in support of the public policy claim, the complaint plainly states that it is based on the reporting of violations:

> 35. Plaintiff Millar was terminated from working as a plumbing, mechanical and/or fire inspector in the jurisdictions of Imlay City and Elba Township at least in part due to and in retaliation for his pattern of fairly and honestly evaluating. communicating, and meeting his legal and professional obligations *to address and report violations of building codes, regulations, rules and statutes* in accordance with his responsibilities as an employee and as a licensed Mechanical Inspector, Plumbing Inspector, Plan Reviewer, Certified Fire Inspector and Journey Plumber.
>
> 36. Defendants' conduct violates prohibitions on employment discrimination and/or termination for activities in accordance with statutory rights or duties, for the exercise of rights conferred by legislative enactments, and/or for failure or refusal to disregard legal and/or professional responsibilities such as those incumbent upon licensed inspectors.

Exhibit A, Complaint. This is almost verbatim of the complaint's allegations in support of the claim under the Whistleblowers' Protection Act, which alleges that Millar "was

[2] Millar does not otherwise appear to challenge his conspiracy claim, which the Court of Appeals properly dismissed because, where his wrongful termination claim fails as a matter of law, there remains no separate, actionable tort in this case. *Urbain v Beierling*, 301 Mich App 114, 131-32; 835 NW2d 455 (2013); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365; 670 NW2d 569 (2003) aff 'd 472 Mich 91 (2005).

terminated . . . due to and in retaliation for his pattern of fairly and honestly indicating his intentions to report and/or reporting violations of building codes, regulations, rules and statutes." *Id.*, ¶ 25.

Finally, the case law on which Millar does rely is inapposite and does not advance his cause. For example, Millar cites *Driver v Hanley*, 226 Mich App 558; 575 NW2d 558 (1997) for the proposition that failure of a claim under the Whistleblowers' Protection Act does not necessarily equate to the failure of a public policy claim arising from the same facts. Application for Leave, p 24. That is not an accurate characterization of the case. The Court in *Driver* instead held that where the circuit court determined that the Whistleblowers' Protection Act was not applicable to the facts regarding the plaintiff's discharge, that is, where the Act provided no remedy at all, it could not have provided the plaintiff's exclusive remedy. Here again by contrast, the Whistleblowers Protection Act provided the remedy to Millar, who claimed he was terminated for reporting code violations.

Klaasen v Twp of St Clair, No. 261190, 2006 WL 2708611, at *4 (Mich Ct App September 21, 2006) likewise does not support Millar's position because it did not address facts arising under the Whistleblower's Protection Act, i.e., the plaintiff was not terminated for reporting violations of the law. Similarly, in *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 532-33; 854 NW2d 152 (2014), app gtd 497 Mich 988; 860 NW2d 927 (2015), vacated and app denied 498 Mich 913; 871 NW2d 298 (2015), the plaintiff's claim did not fall squarely within the Whistleblowers' Protection Act because he did not originate a report or complaint alleging a violation of the Public Health Code, instead, he accused a coworker of malpractice. Thus, the Act was not his exclusive remedy. Again in *Pace v Edel-*

Harrelson, 499 Mich 1, 8-9; 878 NW2d 784, 788 (2016), an employee, who alleged that a manager stated that she intended to use the employer's money to purchase a stove for her daughter, did not engage in protected activity for purposes of the Whistleblowers' Protection Act because the employee's report of a suspected planned or future violation of a law was not encompassed within the protections provided by the Act.

Therefore, because Millar's wrongful termination claim flows from the same circumstances surrounding his Whistleblowers' Protection Act claim, his public policy claim was properly dismissed and this Court should deny leave to appeal.

ARGUMENT III

Imlay City's Entitlement To Governmental Immunity Under The Government Tort Liability Act Provides An Additional Basis For Dismissal Of Millar's Wrongful Termination And Civil Conspiracy Claims.

Neither the trial court nor the Court of Appeals reached the issue of Imlay City's entitlement to governmental immunity under the Governmental Tort Liability Act, MCL 691.1401 *et seq*., and Millar likewise fails to address it in his Application for Leave. But governmental immunity provides another basis for dismissal of Millar's wrongful termination and civil conspiracy claims, and thus an additional reason for this Court to deny leave in this case.

The Governmental Tort Liability Act provides a broad grant of immunity from tort liability to government agencies, absent the applicability of a statutory exception, when they are engaged in the discharge or exercise of a governmental function. MCL 691.1407(1); *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). MCL 691.1407(1) provides that "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1).

Here, there can be no question that Imlay City, as a "political subdivision," MCL 691.1401(e), is a "governmental agency" for the purposes of governmental immunity, MCL 691.1401(d).[3] The Governmental Tort Liability Act defines a governmental function as "an

[3] MCL 600.1401(e) defines "political subdivision" as "a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly." In turn, MCL 691.1401(d) defines a municipal corporation as "a city, village, or township."

activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). The immunity granted by the Act to a municipality is based on the general nature of the activity that was being undertaken when the alleged injury occurred, rather than specific conduct. *Payton v Detroit*, 211 Mich App 375, 391-392; 536 NW2d 233 (1995).

Here, the general nature of Imlay City's actions at issue arise out of its participation in an Interlocal Agreement with the Construction Code Authority, for the purpose of administering and enforcing the City's zoning ordinance, which is a governmental function. Indeed, the administration and enforcement of the City's zoning ordinances is pursuant to local ordinance. (§ 27.1 *et seq*. of City of Imlay City Ordinances, available online at www.amlegal.com or www.imlaycity.org /1/65/ordinances.asp., last accessed 10/19/15). The City has contracted with the Construction Code Authority for these services by an Interlocal Agreement as permitted by the Urban Cooperation Act of 1967, MCL 124.501, *et seq*. The determination of employer, personnel, and staff necessary under the Interlocal Agreement is pursuant to statute. MCL 124.505(g). Michigan law also provides that "[t]he public agencies that are parties to a contract entered into pursuant to [the Urban Cooperation Act] have the responsibility, authority, and right to manage and direct on behalf of the public the functions or services performed or exercised to the extent provided in the contract." MCL 124.505(2).

Thus, there is abundant statutory authority authorizing Imlay City to make requests to the Construction Code Authority concerning the delivery of code inspections and enforcement within Imlay City, an inherently governmental function. As Imlay City was engaged in a governmental function at the time of these events, Millar's claims for civil

conspiracy and wrongful termination – both tort claims –are properly dismissed on the alternate basis of governmental immunity. *Dunbar v Department of Mental Health*, 197 Mich App 1, 10; 495 NW2d 152 (1992) (a claim for wrongful termination sounds in tort); *Glowacki v Motor Wheel Corp*, 67 Mich App 448, 456; 241 NW2d 240 (1976) (civil conspiracy is a tort action).

ARGUMENT IV

This Court Should Deny Millar's Request To Amend His Complaint Because Any Amendment Would Be Futile.

Millar argues that he should be allowed to amend his complaint for several reasons: the complaint states claims on which relief can be granted, he has not previously amended the complaint, there is no evidence of bad faith, and no party would be prejudiced. Application for Leave, pp 29-30. To the contrary, this Court should not permit Millar to amend his complaint because it would be futile.

MCR 2.118(2) states that except as provided in subrule (A)(1), which does not apply here, "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." However, a court may deny leave to amend when it determines that amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Additionally, an amendment is futile "if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Likewise, MCR 2.116(I)(5) provides that if a party asserts a right to summary disposition under MCR 2.116(C)(8), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." Under this court rule as well, an amendment is not justified if it would be futile. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

Millar did not file a written motion to amend the complaint in the trial court and thus he never proffered a proposed amended complaint.[4] But for all of the reasons discussed above, any amendment of his complaint would be futile. First of all, any claim under the Whistleblowers' Protection Act is time barred. The act requires a civil action to be brought within 90 days "after the occurrence of the alleged violation[.]" MCL 15.363(1). Accrual occurs at the time the wrong upon which the claim is based was done, regardless of the time when damage results. *Joliet*, 475 Mich at 36. Here, the alleged violation of the Whistleblowers' Protection Act occurred on March 20, 2014, when Imlay City stated in writing that it no longer wanted Millar performing inspections in its community. But Millar did not file his Whistleblowers' Protection Act claim within 90 days from that date, or by June 18, 2014; instead, he filed it on June 26, 2014. At the latest, Millar's claim accrued March 27, 2014, when the Construction Code Authority sent a letter indicating that Imlay City and Elba Township no longer desired his services. **Exhibit C**. Millar did not file his Whistleblowers' Protection Act claim within 90 days of March 27, 2014, or by June 25, 2014. No amendment of the complaint can account for a different accrual date or avoid the 90-day limitations period, and therefore, amendment would be futile.

The complaint also purportedly includes a public policy wrongful termination claim. "[A] plaintiff asserting a claim for termination in violation of public policy that arises from circumstances that establish a claim for relief under the [Whistleblowers' Protection Act]

[4] At the hearing on Imlay City's motion to dismiss, Millar's counsel asked for leave to amend the complaint. Tr 3/2/15, p 6. The trial court did not address this request in its ruling on the motion. Likewise, in his brief on appeal in the Court of Appeals, Millar requested that if the Court affirmed the trial court's order, it then also direct the court to permit amendment of the complaint. Millar's Brief on Appeal, pp 14, 18-19, 21. The Court of Appeals did not address this request.

will be subject to the act's exclusive remedy and will not be permitted to evade the 90-day limitations period by recasting the claim as a public-policy claim." *Anzaluda*, 292 Mich App at 631-32. Here the in support of the public policy wrongful termination claim, the complaint asserted that Millar

> was terminated from working as a plumbing, mechanical and/or fire inspector in Imlay City and Elba Township "at least in part due to and in retaliation for his pattern of fairly and honestly evaluating, communicating, and meeting his legal and professional obligations to address and report violations of building codes, regulations, rules and statutes in accordance with his responsibilities as an employee and as a licensed Mechanical Inspector, Plumbing Inspector, Plan Reviewer, Certified Fire Inspector and Journey Plumber.

Exhibit A, Complaint, ¶ 35.

In assessing claims, "this Court looks to the true nature of a complaint, reading the complaint as a whole and looking beyond the parties' labels to determine the exact nature of the claim." *Anzaluda*, 292 Mich App at 631-32. Millar's wrongful termination claim clearly arises from the same facts supporting his claim under the Whistleblower's Protection Act – a claim that he was terminated based on violations of various building codes, statutes, etc. – and thus is properly dismissed because the act provides the exclusive remedy. *Anzaluda*, 292 Mich App 626; *Dudewicz*, 443 Mich at 79-80; *Dolan*, 454 Mich at 383. No amendment of the complaint can change the nature of Millar's claim, and therefore, any amendment would be futile and should be denied.

Finally, amending the complaint cannot aid Millar's conspiracy claim and would be futile. The conspiracy claim fails as a matter of law because, given that the wrongful termination claim also fails, Millar cannot establish the requisite underlying tort to sustain a conspiracy claim. *Urbain v Beierling*, 301 Mich App 114, 131-132; 835 NW2d 455 (2013); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365; 670 NW2d

569 (2003) aff'd 472 Mich 91 (2005). In the alternative, Millar could not amend his complaint to plead in avoidance of governmental immunity. As Imlay City was engaged in a governmental function at the time of these events, Millar's claims for civil conspiracy and wrongful termination – both tort claims –are properly dismissed on the alternate basis of governmental immunity. *Dunbar*, 197 at 10; *Glowacki*, 67 Mich App at 456.

For all of these reasons, any amendment of Millar's complaint would be futile and his request should be denied.

RELIEF

WHEREFORE, Defendant City of Imlay City requests this Court deny leave to appeal, issue any other relief this Court deems appropriate, and award costs and attorney fees so wrongfully sustained in defending this appeal.

Respectfully submitted,

PLUNKETT COONEY

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